SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. 334

BRASWELL MOTOR FREIGHT LINES, INC.,

Petitioner,

vs.

LOCAL FREIGHT DRIVERS, LOCAL NO. 208, LINE DRIVERS, LOCAL NO. 224, and FREIGHT HANDLERS, CLERKS AND HELPERS, LOCAL NO. 357, each affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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LOCAL FREIGHT DRIVERS, LOCAL NO. 208, LINE DRIVERS, LOCAL NO. 224, and FREIGHT HANDLERS, CLERKS AND HELPERS, LOCAL NO. 357, each affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Braswell Motor Freight Lines, Inc. hereby petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit entered in this case on February 10, 1970.

Opinions Below.

The opinion of the Court of Appeals affirming the judgment of the United States District Court for the Central District of California is reported at 422 F. 2d 109, and a copy thereof is attached hereto as Appendix A. The findings of fact, conclusions of law and judgment of the District Court are not published in the of-

ficial report, but are set forth at 58 CCH Labor Cases, ¶12,802. Copy of the findings of fact and conclusions of law is attached hereto as Appendix B.

Jurisdiction.

The judgment of the Court of Appeals sought to be reviewed was made and entered February 10, 1970. A petition for rehearing, filed by petitioner, was denied by the Court of Appeals by its order filed May 15, 1970. The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is invoked under 28 USC §1254, Subdivision (1).

Questions Presented.

1. Does a decision of a labor-management committee under "grievance machinery" provisions of a collective bargaining contract constitute a "definitive settlement" so as to be enforceable as an arbitration award when the only provisions of the contract dealing with the consequences of failure of the employer to comply with such decision provide, in effect:

(a) That the employer's failure to comply with such decision relieves the union of its "no strike" pledge under the contract; and

(b) That in the event of a strike permitted because of the employer's failure to so comply, no interpretation of the agreement by *any tribunal* shall be binding upon the union or affect the legality of lawfulness of the strike unless the union stipulates to be bound by such interpretation?

2. Is a post-strike dispute as to the legality of a strike called by unions during the term of a collective bargaining agreement without first resorting to grievance procedures one which must be submitted for determination under the "grievance machinery" provisions of the contract, when such contract provides, in effect:

(a) That there shall be no strike by the unions without first resorting to grievance procedure; and

(b) That refusal of either party to submit to grievance procedure at any stage "withdraws the benefits" of the "no strike, tie up, lockout or legal proceedings" and "grievance machinery" provisions of the contract; and

(c) That—"Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement"?

3. Assuming so otherwise, is the employer required to submit a dispute as to the legality of the strike for "grievance machinery" determination when the sole issue in controversy is whether the strike in face of the "no strike" clause falls within the ambit of *Mastro Plastics Corporation v. NLRB*, 350 U.S. 270; 100 L. Ed. 309; 76 S. Ct. 349 (1956)?

Statutes Involved.

The statute involved is the Labor Management Relations Act, as amended, 61 Stat. 136; 73 Stat. 519; 29 USC §151, *et seq.* The particularly relevant provisions are: §203(d) (29 USC §173(d)); and §301(a) (29 USC §185(a)). They are reproduced as Appendix C hereof.

Statement of the Case.

This action was brought by the plaintiff unions against petitioner to confirm as an arbitration award a decision of a labor-management committee. Jurisdiction of the District Court was invoked under §301(a) of the Labor Management Relations Act, 61 Stat. 156 (29 USC §185(a)). The action was submitted on a statement of agreed facts.

Petitioner is a common carrier by motor vehicle in interstate commerce. [Tr. 66][1] At times pertinent to this action such operations were conducted between Los Angeles, California, on the one hand, and Dallas and Houston, Texas, on the other hand, via El Paso, Texas. [Tr. 66.] The operations east and west of El Paso constituted separate divisions, both for operating and bargaining-unit purposes, and were designated respectively as the Eastern Division and the Western Division. [Tr. 67.]

During the period July 1, 1961 through June 30, 1964 petitioner and the respondent unions (sometimes herein referred to as the "Los Angeles Locals") were parties to a collective bargaining agreement covering employees of petitioner working at points on its Western Division only ["1961 Agreements"].[2] The 1961 Agreements consisted of a "Western Area Master Freight Agreement" ["1961 Master Agreement"] and supplements thereto ["1961 Supplemental Agreements"]. [Tr. 68; 80-96; 97-138.] The provisions of the 1961 Agreements here most pertinent are those contained in

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[1]References are to page numbers of the transcript of record, Volume 2.

[2]Brackets indicate abbreviations of names or phrases employed in the petition.

Article 8 and Article 9, Section 1 of the 1961 Master Agreement, captioned "Grievance Machinery". The text of these provisions is reproduced as Appendix D hereof. The employees on petitioner's Eastern Division have never been union-affiliated and are not involved in any aspect of this controversy. [Tr. 67.]

Prior to June 30, 1964, Braswell Freight Lines, Inc. ["Freight Lines"], a subsidiary of petitioner, operated as an interstate motor carrier between Dallas and Houston, Texas and points in the states of Louisiana, Mississippi, Tennessee and Oklahoma. [Tr. 66-67.] Prior to January 31, 1961 there was a collective bargaining agreement in force between Freight Lines and local unions in the area served by Freight Lines ["Southern Locals"]. [Tr. 69.] After expiration of that agreement there were protracted but unsuccessful negotiations for a new contract between Freight Lines and the Southern Locals. [Tr. 69.] In May, 1962 complaint proceedings were instituted before the National Labor Relations Board ["NLRB"] on charges of the Southern Locals that Freight Lines, petitioner and petitioner's principal stockholder had refused to bargain in good faith, and had done other things also charged as constituting unfair labor practices against the Southern Locals ["NLRB Case"]. [Tr. 70.] In July of 1965 the NLRB decided that Freight Lines and petitioner had refused to bargain in good faith with the Southern Locals, but had not committed other unfair labor practices as charged by the Southern Locals in the NLRB Case. (*154 NLRB 101.*) That decision was affirmed by the Court of Appeals for the District of Columbia Circuit on October 14, 1966. (*Teamsters Local No. 745, et al. v. NLRB; Braswell Motor Freight Lines, Inc., et al, v. NLRB*, 370 F. 2d 226.)

Article 9, Section 1 of the 1961 Master Agreement between petitioner and respondents states, among other things, as follows:

> "The union and the employers agreed that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise."

On June 11, 1962, without first resorting to any of the "Grievance Machinery" procedures in the 1961 Agreements, the Los Angeles Locals went on strike against petitioner and began picketing its terminals at Los Angeles and at certain other points on its Western Division. [Tr. 69-70.] The strike and picketing continued without interruption from June 11, 1962 until April 1, 1963 ["Strike Period"], at which date the strike and picketing were voluntarily discontinued by the Los Angeles Locals. [Tr. 72.] The legality of this strike is the central issue in controversy between the parties.

At no time during the Strike Period was there any controversy between petitioner and respondent unions as to any matter directly related to, or arising out of, the 1961 Agreements. Rather, the sole basis of the strike and picketing was as a protest against the unfair labor practices assertedly committed by Freight Lines and petitioner against the Southern Locals which were the subject of the then pending NLRB Case. [Tr. 70.]

Neither Freight Lines nor the Southern Locals were parties to the 1961 Agreements.[3] The Los Angeles

[3]The only connection between the Southern Locals and the respondent unions was that both groups of local unions were af-

Locals represented no employees of Freight Lines. Petitioner had no connection with the negotiations between the Southern Locals and Freight Lines except as the parent of Freight Lines.

During the Strike Period, and since, the position of respondents has been that the strike and picketing were a protected activity under Section 7 of the Act, pursuant to the doctrine enunciated in *Mastro Plastics Corporation v. NLRB*, 350 U.S. 270; 100 L. Ed. 309; 76 S. Ct. 349 (1956). Petitioner has disputed the applicability of that doctrine in the situation here involved.

During the Strike Period petitioner operated with employees hired to replace strikers, but the 1961 Agreements continued in force. [Tr. 72.] The procedural steps ultimately culminating in the judgment here challenged began in April of 1963, shortly after the strike ended, when respondent unions demanded that petitioner reinstate the strikers to their former positions with seniority over their replacements. [Tr. 72-73.] Petitioner was willing to employ strikers as new employees but refused to reinstate them with the seniority requested on the grounds that they had been permanently and legally replaced, and had ceased to be employees. [Tr. 72-73.]

Respondents thereupon instituted grievance proceedings under the "Grievance Machinery" procedures established in the 1961 Master Agreement, asserting that petitioner had violated provisions of the 1961 Master Agreement pertaining to seniority and protec-

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filiated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ["Teamsters"].

tion of rights. (Article 6, Section 1 and Article 10, Section B-1, 1961 Master Agreement) ["Grievance Cases"]. [Tr. 73.]

After they were filed but before any further action had been taken on the Grievance Cases, petitioner filed an action in the U. S. District Court for the Central District of California entitled *Braswell Motor Freight Lines, Inc. v. International Brotherhood of Teamsters, et al.*, Case No. 63-634-EC ["Declaratory Relief Action"] in which petitioner here sought a judicial declaration to the effect that petitioner was under no duty to submit to grievance-machinery handling under the 1961 Agreements the disputes raised in the Grievance Cases. [Tr. 73.] The judgment of the District Court was that the disputes posed by the Grievance Cases were disputes subject to determination under grievance procedures of the 1961 Master Agreement [Tr. 275-276.] The findings of fact and conclusions of law of the District Court in support of that judgment are set forth at pages 266-274 of the transcript of record.[4] Petitioner appealed from the judgment in the Declaratory Relief Action and the matter is still pending before the U. S. Court of Appeals for the Ninth Circuit in Case No. 20146.

During the pendency of the Declaratory Relief Action in the District Court, a Joint Area Committee con-

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[4]Included among the conclusions of law were conclusions that whether Freight Lines and petitioner had committed unfair labor practices in their dealings with the Southern Locals was for the NLRB to determine; and that petitioner was not bound to submit for determination through grievance procedures the question as to whether the action of petitioner's former employees in joining the strike in protest of asserted unfair labor practices was a protected activity under the provisions of the National Labor Relations Act. [Tr. 273, Items (d) and (e).]

vened under the 1961 Agreements decided that it had jurisdiction of the Grievance Cases, but deadlocked on the merits thereof. [Tr. 188-191.] The Joint Western Committee, convened under the 1961 Agreements, to which the matter was referred, voted on November 12, 1963 that the Grievance Cases be taken off the agenda and postponed pending determination of the unfair labor practices charges in the NLRB Case. [Tr. 196.]

The term of the 1961 Agreements ended June 30, 1964. New agreements between petitioner and respondent unions, differing from the 1961 Agreements as to grievance-machinery provisions and otherwise in a number of respects, became effective on July 1, 1964, for a term ending March 31, 1967. ["1964 Agreements".] [Tr. 75; 197-265.]

After the decision of the NLRB in the NLRB Case, and while the NLRB Case was pending on review before the Court of Appeals for the District of Columbia Circuit, the Grievance Cases were called for hearing before a Joint Western Area Committee created under the 1964 Agreements. [Tr. 77, 278.][5] On September 16, 1965 this Committee deadlocked on the question of whether it should hear the Grievance Cases while the NLRB Case and the Declaratory Relief Action were pending. [Tr. 287-88.] On November 12, 1965, after it had been directed to proceed by a multi-conference

[5]The labor management committee involved, the District Court and the Court of Appeals for the Ninth Circuit, have rejected a contention of petitioner that committees convened under the 1964 Agreements had no power to decide the Grievance Cases. While petitioner disputes the validity of these holdings, it considers the error is such that it does not provide an appropriate basis for seeking a writ of certiorari. Therefore, facts pertinent to the issue of the power of the Labor Management Committee to act are not summarized in this statement of facts, except as necessary for presentation of other issues.

committee created as provided under the 1964 Agreements, the Joint Western Area Committee considered the Grievance Cases on their merits and decided as follows:

> "That the grievance is sustained. Under the circumstances, the ruling of this Committee is that those Braswell employees who observed the picket lines on the basis of Braswell's unfair labor practices and who thereafter made unconditional offer to return to work, shall now be offered reinstatement with full seniority from their last original date of hire." [Tr. 344.]

Petitioner took no part in any of the various grievance committee proceedings other than to challenge the jurisdiction of each such committee to act each time any such hearing was held.

Respondent unions began this action on February 23, 1966. By its judgment entered on June 13, 1968 the District Court confirmed the foregoing decision of the Joint Western Area Committee.

ARGUMENT.

1. The Holding of the Court of Appeals That the Grievance Committee's Decision Is Enforceable as an Arbitration Award Is at Odds With the Policy Stated in Section 203(d) of the Labor Management Relations Act and Decisions of This Court Interpreting and Applying That Law.

The immediate subject of the challenged award is the seniority rights of two groups of employees, both covered by the same bargaining agreement and both represented therein by the respondent unions. Petitioner is not directly involved with that dispute. It has always been prepared to honor the seniority of the group lawfully entitled to that privilege. The controversy between petitioner and respondents is whether the court or a grievance committee has jurisdiction finally to decide the legality of the strike—the core issue in the seniority controversy.

Section 203(d) of the Labor Management Relations Act ["LMRA"] declares "final adjustment" by a method agreed upon by the parties to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. This Court has frequently noted that for this policy to be implemented, agreed procedures for settlement of differences must be given full play. (*United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566; 4 L. Ed. 2d 1403; 80 S. Ct. 363 (1960); *Drake Bakeries v. Local 50*, 370 U.S. 254, 263; 8 L. Ed. 2d 474; 82 S. Ct. 1346 (1962); *The Boys Market, Inc. v. Retail Clerks Union Local No. 770*, ... U.S. ..... (June 1, 1970)).

However, from the outset it has been recognized that a "no strike" obligation is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration. (*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455; 1 L. Ed. 2d 972; 77 S. Ct. 912 (1957); *The Boys Market, Inc. v. Retail Clerks Union Local No. 770*, . . . U.S. . . . (June 1, 1970)). Necessarily, therefore, the key circumstance in every case of this type is whether the agreed procedure results in a "definitive settlement" of the controversy. (*General Drivers Union No. 89 v. Riss and Co.*, 372 U.S. 517, 519; 9 L. Ed. 2d 918; 83 S. Ct. 789 (1963)).

By its decision the Court of Appeals tacitly admits the grievance-machinery provisions here involved do not necessarily result in a "final adjustment" and "definitive settlement" of any grievance controversy. In essence, the Court of Appeals says that even though the grievance procedure is not the parties' chosen instrument for "definitive settlement" of all covered disputes, the award must be enforced simply because in this particular instance the unions are "in court" and "not in the street". Such holding begs the issue and is in direct conflict with the Congressional policy of §203(d) of the LMRA.

Nowhere in the grievance-machinery provisions here under consideration is there any promise of either party that the grievance procedures shall constitute a "definitive settlement" for grievance controversies.

Under Article 9, §1 of the 1961 Master Agreement, the promise the parties made was to use all possible means of settlement of any covered controversy before resorting to strike, lockout, tie up or legal proceed-

ings.[6] Nowhere in the "Grievance Machinery" provisions is there language suggesting such procedure shall be the "sole means of attaining adjustment" of any dispute. (See: *Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 553; 11 L. Ed. 2d 898; 84 S. Ct. 909 (1964)). Nor is there any language suggesting that the grievance procedure rather than a strike is "the terminal point of disagreement" as was the situation in the *Steelworkers* Trilogy of cases.[7] To the contrary, Article 9, §1 contains express provisions making self-help the sole remedy for the final determination of all covered controversies.

Article 9, §1 contains express provisions that "all possible means of settlement" will be exhausted, either by deadlock or a committee decision, at some stage in the agreed procedure. In its decision the Court of Appeals acknowledges that when deadlock occurs, ". . . the parties are relieved of their no-strike pledge and must thereafter resolve their difference by such self-help action as each deems will be most effective." However, the Court discounts the importance of the deadlock alternative because of the fact that in this case there was a decision. The distinction made reveals a failure of the Court of Appeals to appreciate

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[6]The "Grievance Machinery" provisions here pertinent are basically the same in both the 1961 and 1964 Agreements. For simplicity, reference is made in the text in each instance to the sections and paragraphs of the 1961 Agreements, which are reproduced in Appendix D hereof.

[7]*United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581; 4 L. Ed. 2d 1409; 80 S. Ct. 1347 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 367 U.S. 564; 4 L. Ed. 2d 1403; 80 S. Ct. 1343 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593; 4 L. Ed. 2d 1424; 80 S. Ct. 1358 (1960).

the true nature of the issue involved, and a misconception of the contract terms.

The question here is whether the grievance machinery establishes a procedure which will inevitably result in a final adjustment of a covered grievance, not whether it could do so in a particular case. (See: *General Drivers Union No. 89 v. Riss and Co.*, 372 U.S. 517, 520, *supra; Wiley and Sons v. Livingston*, 376 U.S. 543, 547; 11 L. Ed. 2d 898; 84 S. Ct. 909 (1964)). A grievance procedure which expressly contemplates the possibility of deadlock and makes self-help the only remedy thereafter cannot possibly qualify as a "chosen instrument for the definitive settlement" of controversies within the ambit of *Riss and Co.*, the *Steelworkers* Trilogy of cases and other similar cases, or be equated with the "final adjustment" concept expressed in §203(d) of the LMRA.

Contrary to the suggestion of the Court of Appeals, the ultimate consequences are the same under the grievance-machinery provisions when a party fails to comply with a committee decision as they are when there has been a deadlock. Article 9, §1 and subsections (h) and (i) deal specifically with the agreed consequences of a failure of either party to comply with a committee decision. As here pertinent, Article 9, §1(h) states:

> ". . . failure to comply with any final decision withdraws the benefits of Article 9."

The benefits of Article 9 are: (i) the agreement to suspend strikes, lockouts, tie-ups or legal proceedings while grievance proceedings are in process; and (ii) the right to resort to such grievance proceedings.

Article 9, §1(i), as here pertinent, says:

> "In the event of strikes, work stoppages or other activities which are permitted in case of . . . failure to comply with majority decisions, no interpretation of this agreement by *any tribunal* shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve *all questions* of interpretation by mutual agreement." (Emphasis added.)

Thus, under Article 9, §1, the expressly stated consequences of a failure of one party to abide by a committee decision are that the non-defaulting party is relieved of its no strike, no lockout, no tie-up, no legal proceeding pledge, and the defaulting party is deprived of the right to further resort to grievance machinery, at least in connection with that controversy.

Nowhere in the grievance-machinery provisions is there any language suggesting that the parties shall or may use judicial remedies as a means of enforcing a decision.[8] On the contrary, in Article 9, §1(i) they have stated expressly that it is their intention, when there is deadlock or default, that all grievable questions shall ultimately be resolved by self-help. The extent of their commitment to self-help as the final means

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[8]In the 1964, but not in the 1961, Agreements the review committee decisions are described as "final and binding". As the Court of Appeals recognizes, such statements are not determinative of the issue here. Its conclusion conforms to the holding in *Riss and Co.*, 372 U.S. 517, 519, *supra*, that it is the practical consequence and not the form which is important; and squares with a decision of the Court of Appeals for the Seventh Circuit construing the same language in *Artim Transportation System, Inc. v. NLRB*, 396 F. 2d 359 (1968).

for adjustment of grievable disputes is underscored in the agreements in two ways. First, there is an express provision in Article 9, §1(i) that an interpretation of the agreement by "any tribunal" shall not be binding upon a union unless it agrees to be so bound. And second, in other portions of their agreements, the parties expressly provided that certain disputes should be excluded from grievance-machinery handling and instead be submitted "to arbitration", by an independent "arbitration board", so constituted as to avoid possibility of deadlock. Further, in such situations arbitration board decisions are expressly declared to be "final and binding" without reservation of rights to self-help or to the immunity from legal review so carefully spelled out in the "Grievance Machinery" provisions. [Tr. 107-108, Article 5, Sect. 15, 17; Tr. 228-229, Article 58, Sect. 15, 17.]

In its opinion the Court of Appeals concedes that the contract expressly allowing the unions the right to strike "to enforce" a grievance committee decision is "troublesome". Reasoning that it is the policy of the LMRA to promote industrial peace by giving full play to the means chosen by the parties for settlement of their difficulties, the Court of Appeals concludes that judicial enforcement of the committee award is an alternative remedy at least, and that by seeking court enforcement, the unions have "elected to forego their economic enforcement weapons." The argument is one of those that appears plausible but is in reality entirely unsound.

Normally parties do not need judicial assistance on the issue of enforceability when their agreement states clearly that the settlement procedure is to be the sole

method for resolving covered disputes. Litigation arises when the parties are in disagreement as to whether the grievance procedure qualifies as the "chosen instrument for definitive settlement" of such disputes. The party contending for the right of judicial enforcement will always be "in court" and not "in the street". Conversely, the party resisting such enforcement will always be in the unenviable position of urging an interpretation of the agreement which is in some ways at odds with the policy set forth in §203(d) of the LMRA.

Thus, if the logic of the Court of Appeals were sound, every grievance procedure decision would automatically qualify as a judicially enforceable award the moment the party who prevailed in the grievance proceeding filed judicial action under §301(a) of the LMRA seeking such enforcement. In short, under the premises of the Court of Appeals, the agreements of the parties as to enforceability ceases to be a justiciable issue.

No one will argue that it is the policy of the LMRA to encourage arbitration rather than self-help as a means of finally resolving disputes arising under collective bargaining agreements. But it is, after all, a "policy" and not a mandate of that Act. Despite the policy the parties are still free to decide when they contract how far they are prepared to go in eliminating self-help as the means for resolving disputes arising while the contract is in force.

A party to a collective-bargaining agreement cannot be bound by an extra-judicial determination of a dispute unless he agrees to be so bound. (*Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547; 11 L. Ed. 2d

898; 84 S. Ct. 909 (1964); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238; 8 L. Ed. 2d 462; 82 S. Ct. 1318 (1962)). The power of a court to enforce such an extra-judicial determination arises out of the agreement and not because the action is brought. If the court can say the parties have selected the grievance proceeding as their "chosen instrument for the definitive settlement" of the dispute, the award is enforceable. Otherwise it is not. (*General Drivers Union No. 89 v. Riss and Co.*, 372 U.S. 517, *supra.*

The Court of Appeals was apparently motivated to sustain the judgment ordering enforcement of the award because it considered the filing of the action as an election by the unions ". . . to forego their economic enforcement weapons". Such determination is simply a judicial interpretation of the agreement.

As earlier noted, Article 9, §1(i) of the 1961 Master Agreement provides in part that:

> "In the event of strikes, work stoppages or other activities which are permitted in case of deadlock, default or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement."[9]

On the premise of the Court of Appeals that the enforcement action can be maintained, such action most

[9]The language quoted is identical with that in the 1964 Agreements.

certainly qualifies as one of the permitted "other activities" contemplated by the foregoing provision. And, under the express language of such provision, the unions are not bound by the conclusion of the Court of Appeals that by filing the action they elected to forego enforcement by resort to economic weapons.

Because the unions are free to ignore any judicial interpretation of the agreement involving post-grievance-decision action to which they do not consent, there is no way to prevent them from using economic sanctions to "enforce" the award any time they choose. Even a later judicial decision that such economic action violates the agreement as interpreted by the Court of Appeals here would not be binding on the unions under the contract language above quoted. Thus, contrary to the view expressed by the Court of Appeals, the unions could here pursue "both judicial and economic remedies" if the judgment ordering enforcement were sustained.

The concept that the prevailing party in a grievance dispute can elect after decision whether to use economic or legal remedies does not square with the test of "definitive settlement" enunciated in *Riss and Co.*, 372 U.S. 517, *supra*. And when, as here, the grievance machinery provisions go so far as to guarantee that post-deadlock and post-grievance-decision strikes shall be totally immune from mandatory judicial control, the conclusion that the essential requirements of enforceability have not been met becomes inescapable.

The grievance-machinery language at issue here is comparable to that involved in *General Drivers Union No. 89 v. Riss and Co.*, 372 U.S. 517, *supra*. Therein this Court acknowledged that the sufficiency of such

language as a "definitive settlement" of disputes is arguable. In its decision the Court of Appeals talked about, but did not apply, the test of enforceability prescribed in *Riss and Co.* It did, however, concede that there are provisions involved which make the issue of enforceability a "troublesome" one. The contract provisions in issue are commonly used in bargaining agreements involving Teamster-affiliated unions and have frequently been the source of litigation. (See: *Stillpass Transit Company, Inc. v. Ohio Conference of Teamsters*, 382 F. 2d 940, CA 6th Cir. (1967); *Teamsters Local No. 728 v. Georgia Highway Express, Inc.*, 328 F. 2d 93, CA 5th Cir. (1964); *Artim Transportation System, Inc. v. NLRB*, 396 F. 2d 359, CA 7th Cir. (1968)). The issue of enforceability is a basic one. Inevitably the utimate decision here will have far-reaching consequences. Premises considered, review by this Court of the issue of enforceability is appropriate.

2. The Decision of the Court of Appeals That the Dispute as to the Legality of the Strike Was Arbitrable Is in Conflict With Applicable Decisions of This Court and in Conflict With a Decision of the Court of Appeals for the Sixth Circuit on the Same Matter.

The legality or illegality of the strike of the respondent unions while the no-strike agreement was in force fixes the relative seniority rights of the strikers and their replacements. (*Mastro Plastics Corporation v. NLRB*, 350 U.S. 270; 100 L. Ed. 309; 76 S. Ct. 349 (1956)). At all stages in the controversy, including the appeal from the judgment of enforcement, petitioner has contended that the legality of the strike is not an arbitrable dispute. The contention is based upon three in-

dependent grounds. Two are based upon language in the bargaining agreement; the third turns on the purpose of the particular strike in question.

In its opinion the Court of Appeals considered only the third-mentioned ground. Its failure to discuss the other two was the subject of the petition for rehearing, which has now been denied.

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit. (*Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241; 8 L. Ed. 2d 462; 82 S. Ct. 1318 (1962); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574; 4 L. Ed. 2d 1409; 80 S. Ct. 147 (1969)).

The no-strike clause in Article 9, §1 of the 1961 Agreements was in force when the respondent unions called the strike against petitioner on June 11, 1962 and continued in force during the entire period of time the strike was maintained. The last sentence of Article 9, §1 reads as follows:

> "Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement."

In the context of Article 9, §1 as a whole, "the strike" can only refer to a pre-grievance-proceeding strike because post-grievance-proceeding strikes are expressly authorized under the contract, and the right to judicial determination of their validity is expressly waived.

It is petitioner's position that the concluding sentence of Article 9, §1 above quoted specifically exempts from grievance-machinery handling a dispute as

to the legality of a strike called while the no-strike clause is in force.

The legality of a strike in face of a no-strike clause is a dispute which assaults the heart of the bargaining relationship. (*Drake Bakeries v. Local 50*, 370 U.S. 254, 259-60; 8 L. Ed., 2d 474; 82 S. Ct. 1346 (1962)). This Court said that if the parties want a dispute exempted from coverage under otherwise broad language, they should expressly so state. That is exactly what the parties did do in the contract here in issue when they provided that nothing in the agreement should be construed to prevent judicial determination of the legality of a strike.

Stillpass Transit Company, Inc. v. Ohio Conference of Teamsters, 382 F. 2d 940, *supra*, dealt with grievance-machinery language which, as pertinent, was identical with that here involved. In *Stillpass* the union struck without first resorting to grievance while the no-strike clause was in force. The employer brought action seeking damages for breach of the no-strike clause under §301(a) of the LMRA. The union moved for stay of the court proceedings pending arbitration of the issue of legality of the strike under grievance machinery. After quoting grievance-machinery language essentially identical with the provisions of Article 9, §1(i) of the 1961 Agreements, with specific emphasis on the concluding sentence quoted above, the Court of Appeals for the Sixth Circuit stated:

> "The contract provides that the employer can institute legal proceedings when the strike is in violation of the collective-bargaining agreement. Paragraph 8(1)(f) provides that those strikes which are 'permitted' or not in violation of the agree-

> ment are those which are commenced after the grievance procedure has been instituted and has broken down, namely in cases of 'deadlock, default or failure to comply with majority decision or in case of refusal to abide by the umpire's award . . .' *Under the facts presented it is apparent that the contract is not susceptible to a construction which would bind the employer to arbitrate his claim for damages for breach of a union's agreement not to strike. (Atkinson v. Sinclair Refining Co.*, 370 U.S. 238.)" (Emphasis added.)

Obviously the holding of the Court of Appeals here that the legality of the strike is arbitrable is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Stillpass* on the same matter. Further, the holding of the Court of Appeals that the strike issue is arbitrable is in conflict with *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, *supra*, and other applicable decisions of this Court above cited.

The second ground urged by petitioner in support of its contention that the strike issue is not arbitrable poses a question of federal law which has not been, but should be, settled by this Court. Article 9, §1(h) of the 1961 Master Agreement, which was in force when the strike of the respondent unions was called, reads, as here pertinent, as follows:

> ". . . refusal of either party to submit to . . . the grievance procedure at any stage . . . withdraws the benefits of Article 9."

A strike while a no-strike clause is in force may be legal because it falls under an express exemption to the

no-strike provision in the contract, or because it is within a judicially-developed exemption to the provision. (See: *Artim Transportation System, Inc. v. NLRB,* 396 F. 2d 359, *supra.*) At all stages in this controversy it has been the position of the respondent unions that "any controversy that might arise" during the term of the contract was arbitrable under the "Grievance Machinery" provisions. They have urged that only by so interpreting the contract provisions can full play be given to the policy of the law favoring arbitration. [Tr. 437-441.]. Thus, on the interpretation of the contract urged by respondent unions the request of respondent unions that petitioner should discontinue unfair labor practices against the Southern Locals was a controversy which they could have submitted for settlement under the grievance-procedure provisions of the 1961 Master Agreement before calling a strike. By striking without first resorting to grievance procedure, respondent unions refused "to submit" to grievance procedure in the most effective way possible. By so doing, they exercised the election given to them in Article 9, §1 (h) to waive the "benefits" of Article 9 as to that controversy. One of the benefits so waived was any right which they might otherwise have had to insist that petitioner submit to arbitration the issue as to the legality of their strike.

The freedom from strike is the *quid pro quo* for the agreement to arbitrate. If unions can take to the streets to "enforce their views" on a grievable issue, and thereafter compel the employer to arbitrate questions which are the consequence of the strike after the economic sanction has failed to accomplish its purpose, the stabilizing influence of arbitration is completely destroyed.

Further, there is a very real question as to whether a contract which contains the language appearing in Article 9, §1(h) should be accorded the protection favoring arbitration spelled out in the *Steelworkers* Trilogy cases. Thus, because of its unusual nature, Article 9, §1(h) poses important question of federal law which have not been, but should be, settled by this Court. Since the language is to be found in many bargaining agreements of Teamster-affiliated unions, the consequences of the decision in this case are far-reaching.

3. The Decision of the Court of Appeals That the Dispute as to Whether the Strike of the Unions Was Properly Under a Judicial Exemption to the No-Strike Clause Is Not in Accord With Applicable Decisions of This Court and Raises an Important Federal Question Which Has Not Been, but Should Be, Settled by This Court.

A strike while a no-strike agreement is in force is lawful only if it falls within an exemption to the no-strike clause stated in the contract or is within the scope of a judicially-developed exemption to such contractual no-strike obligations. (See: *Artim Transportation System, Inc. v. NLRB*, 396 F. 2d 359. CA 7th Cir. (1968)).

The unions contend that the individual strikers had a right under Article 10, §B-1 of the contract[10] to refuse to go through or work behind a lawful picket line of the union at petitioner's place of business. Thus, the rights of the strikers depend upon the lawful character of the strike and picket line of respondent unions.

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[10]The text of Article 10, §B-1 is quoted in the opinion of the Court of Appeals attached as Appendix A.

Under the statement of agreed facts, the strike and picketing by the respondent unions (Los Angeles Locals) was solely as a protest against unfair labor practices committed by the "Braswell companies" against the Southern Locals, which were the subject of the NLRB Case. [Tr. 70, 139.] There is no provision in the 1961 Agreements exempting such a strike from the no-strike undertaking as a matter of contract. The unions have never so argued.

Throughout, the unions have contended the strike and picketing were lawful because they were for a purpose falling within a judicial exemption to all "no-strike" clauses created by this Court in *Mastro Plastics Corporation v. NLRB*, 350 U.S. 270; 100 L. Ed. 309; 76 S. Ct. 349 (1956). In *Mastro Plastics* the union and employees struck in protest against unfair labor practices committed against them by the employer during the term of a contract which contained a provision that the unions would refrain from engaging in any strike during the term of the agreement. This Court held that the contract could not be construed as waiving the employees' right to strike solely against unfair practices committed against them by their employer. (*Mastro Plastics Corporation v. NLRB*, 350 U.S. 270, 284, *supra.*)

Petitioner had committed no unfair labor practices against respondent unions or against the strikers. Petitioner's conduct in no way involved the 1961 Agreements. Rather, the practices complained against related to a contract to which the respondent unions were not party and were directed against stranger unions and employees of an affiliated company, all located in an area far removed from the place where the strike took place.

The ultimate question, therefore, is whether the strike by the Los Angeles Locals for the purpose of protesting unfair labor practices by petitioner against these third parties falls within the ambit of the judicial exemption created by this Court in *Mastro Plastics*. Ultimately this Court is the only forum in which a definitive settlement of this dispute can be achieved. Briefly, petitioner's position is that the question of the limits of a judicial exemption to no-strike agreements generally cannot properly be made an arbitrable issue. The grounds of the contention are twofold.

One basis is that the bargaining agreement by its terms limits the jurisdiction of grievance committees to disputes arising "under" or "involving interpretation of" the agreement. (See: Article 8, §1 and Article 9, §1(d) of the 1961 Agreements—Appendix D). Whether the strike does or does not fall within the judicial exemption to no-strike clauses created in *Mastro Plastics* is a dispute which neither arises under nor involves interpretation of the agreement. The basic premise of *Mastro Plastics* is that the parties, even by express languge, cannot by their contract defeat the purposes of the LMRA. Therefore, in the situation here presented, whether given conduct does or does not fall within the scope of the exemption immediately influences the scope of contract coverage. Accordingly, if the parties could by their agreement delegate to their own representatives the determination of the scope of the judicial exemption, they could accomplish by indirection the very results this Court has said in *Mastro Plastics* they cannot accomplish directly. In short, the policy considerations underlying the decision in *Mastro Plas-*

tics in this instance compel interpretation against, rather than for, coverage of the dispute.

Petitioner's second contention against arbitrability is that the sole determination to be made in deciding whether the strike does or does not fall within the judicial exemption created in *Mastro Plastics* involves legal conclusions and questions of proper interpretation and application of the provisions of the LMRA, and particularly §7 thereof. As this Court pointed out in its decision in *Mastro Plastics*, the bargaining contract deals with terms of employment, normal operation of the plant, and economic relationships between the employers and the employees. (*Mastro Plastics*, 350 U.S. 270, 281, *supra.*) The judicial exemption, on the other hand, stems from the necessity for preserving the more fundamental rights and obligations which are the subject of the LMRA. (*Mastro Plastics*, 350 U.S. 270, 283-284, *supra.*) So important is the preservation of uniformity of interpretation of the LMRA that, except in limited circumstances, primary jurisdiction for interpretation of that Act is vested in the NLRB. (*San Diego Building Trades Council v. Garmon*, 359 U.S. 236; 3 L. Ed. 2d 775; 79 S. Ct. 773 (1959); *Smith v. Evening News Association*, 371 U.S. 195; 9 L. Ed. 2d 246; 83 S. Ct. 267 (1962)).

The rule is well settled that the courts will not review an arbitrable dispute upon its merits. (*United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 568; 4 L. Ed. 2d 1403, 1407; 80 S.Ct. 1343 (1960)). Hence, if the scope of the judicial exemption created in *Mastro Plastics* is an arbitrable issue, there is no possible way to test the legal validity of a committee decision that a given strike does

or does not fall within the scope of the judicial exemption. A nonexpert body is, therefore, interpreting and applying the LMRA on matters involving fundamental policy in a situation in which no party has any way to challenge the legal validity of such interpretation.

The Court of Appeals holds that the issue of strike legality is arbitrable on authority of *Vaca v. Sipes*, 386 U.S. 171; 17 L. Ed. 2d 842; 87 S. Ct. 903 (1967); *Smith v. Evening News Association*, 371 U.S. 195, *supra;* and *Carey v. Westinghouse Corp.*, 375 U.S. 261; 11 L. Ed. 2d 320; 84 S. Ct. 401 (1964). None of the cases is apposite in the context cited.

In *Vaca v. Sipes* and *Smith v. Evening News*, individual employees brought actions under §301(a) of the LMRA involving issues contended to be within the exclusive jurisdiction of the NLRB to decide under the preemption doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, *supra*. In *Smith* the bargaining agreement contained no grievance-arbitration procedure. (371 U.S. 195, *supra*.) In *Vaca v. Sipes* the action was for damages resulting from the failure of the employer and union defendants to take an admittedly covered dispute to final arbitration. The jurisdiction of the Court to pass on the charge of unfair representation was disputed because such conduct constituted an unfair labor practice under LMRA. The power of the Court rather than the NLRB to so decide was affirmed. There was also a holding that the employee plaintiff was not required to process the unfair-representation issue through grievance as a condition precedent to legal action.

There is no issue here of accommodating the jurisdiction of federal courts with that of the NLRB to de-

cide issues involving interpretation of the LMRA. The contention of petitioner is that both on the basis of the terms of the bargaining agreement and considerations of policy, jurisdiction to interpret and apply the LMRA, and decisions of this Court relating thereto, cannot be vested solely in a contractually-created extra-judicial agency.

In *Carey v. Westinghouse Electric Corp.*, 375 U.S. 216, *supra*, the action was to compel arbitration of a dispute which, under the peculiar facts, could turn out to be either (1) a work assignment dispute; or (2) a controversy as to which of two unions was the lawful representative of employees doing a particular kind of work. The issue was raised that the dispute should not be sent to arbitration because the second alternative dispute would pose issues of unfair labor practices determinable by the NLRB. This Court held that arbitration should have been ordered. The basis was that as a work assignment dispute, there was no barrier to arbitration. On the representation aspect, attention was directed to the fact that the second union involved was not a party to the litigation; that if this was truly a representation case the parties would have an effective remedy before the NLRB and probably also before the courts to protect their interests under LMRA; and that such tribunals would not be bound by the arbitrator's determination. (375 U.S. 261, 268, 272, *supra*.) Premises considered, the potential of a representation dispute did not bar reference because the arbitrator's conclusions, though not conclusive, might have a "pervasive, curative effect."

The situation here is fundamentally different from that in *Carey v. Westinghouse*. The direct issue is the

interpretation of a decision of this Court which in turn involves equating the importance and relevance of the rights asserted by the strikers and the unions under §7, and possibly other provisions, of the LMRA, with the Congressional policy in favor of labor peace being implemented by the "no-strike" provisions of the contract. The decision of the Court of Appeals that the committee had power to decide whether the strike here was within the scope of the judicial exemption intended by this Court in *Mastro Plastics* put that issue forever beyond the pale of review, either by the courts or by the NLRB.

As earlier stated, the basic premise of *Mastro Plastics* is that the parties cannot make their "no-strike agreements" so broad as to frustrate the policies and purposes of the LMRA, and that their agreements must be read as including a judicially-imposed exemption to preclude such results. It would seem axiomatic that the scope of a judicial exemption should always be judicially determined. There must be a fundamental error in a decision which holds that the parties can by contract foreclose this Court from reviewing a determination as to the scope of the judicial exemption which it created in *Mastro Plastics* when the exemption was established in the first place to prevent the contracting parties from over-extending their agreements.

The question of the extent to which parties can deprive the courts of the power to interpret and apply judicial exemptions to "no-strike" clauses raises important problems of policy under the LMRA. In the context in which the problem arises it involves not concurrent but exclusive jurisdiction. From the opinion in the Court of Appeals it is apparent the ramifications

of the decision that the strike issue was arbitrable have not been fully considered. Again, many persons besides those here involved are affected.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Local Freight Drivers, Local No. 208; Line Drivers, Local No. 224, etc., Plaintiffs-Appellees, vs. Braswell Motor Freight Lines, Inc., Defendant-Appellant. No. 23,174.

Appeal from the United States District Court for the Central District of California.

Before: BARNES, DUNIWAY and ELY, Circuit Judges.

DUNIWAY, Circuit Judge.

The plaintiff unions brought this action under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, to confirm as an arbitration award a decision of a labor-management committee formed under a collective bargaining agreement to consider grievances. The district court confirmed the award. We affirm.

Plaintiffs are local affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Braswell Motor Freight Lines, Inc. (Braswell) is an interstate common carrier by motor vehicle. Braswell's operations have been carried on through "Eastern" and "Western" Divisions and through a subsidiary company, Braswell Freight Lines, Inc. (Freight Lines). Freight Lines was merged into Braswell on July 1, 1964, and Braswell has since then conducted the former operations of Freight Lines as a separate division.

Each of the three divisions operates in a different geographic area and has its own history of labor relations. The Eastern Division employees have at all times been nonunion. Freight Lines employees have been represented by certain local Teamster affiliates (the Southern Locals). Freight Lines was a member of a multi-employer group which had negotiated a contract with the Southern Locals expiring on January 31, 1961. Before the termination of that contract, Freight Lines withdrew from its employer group and negotiated for a new contract directly with the Southern Locals, but without reaching an agreement. The Southern Locals went on strike against Freight Lines on April 23, 1962, and on April 28, 1962, they filed unfair labor practice charges against Freight Lines.[1]

Braswell's Western Division employees are represented by the plaintiff unions among others. Braswell is a member of the California Trucking Association, Inc. (CTA) which represents it for bargaining purposes. CTA on September 15, 1961, entered into "the 1961 Western Master Agreement" with the unions, which ran from July 1, 1961 to June 30, 1964, and which with supplemental agreements covered Braswell's Western Division employees.

The grievance underlying the present dispute between the parties arose from a strike by the unions against Braswell's Western Division from June 11, 1962 to April 1, 1963. The strike was called and maintained by the unions as a protest against the unfair labor practices allegedly committed by Freight Lines against the Southern Locals. Braswell continued operations throughout the strike period by hiring other employees to replace the strikers. After the strike ended the

unions demanded that Braswell restore the strikers to their former positions, without loss of seniority. Braswell refused to do so on the ground that the strikers had been permanently and legally replaced and had ceased to be employees. Braswell was willing to employ the strikers as new employees as positions became available. The 1961 Agreements remained in force.

The unions sought to vindicate their contentions regarding the strikers by initiating proceedings under the grievance provisions of the 1961 Master Agreement.[2] This Agreement provided for grievance committees composed of equal numbers of union and management representatives for various geographic areas covered. The relevant committee in this case was the Southern California Joint Area Committee. In this opinion, we refer to it as the 1961 Joint Area Committee. At a hearing before this committee Braswell entered a special appearance challenging the right of the committee to hear and determine the grievances. The Committee voted to overrule these objections, and to hear the cases. At the hearing on the merits, Braswell again specially appeared. The Committee proceeded, but deadlocked on the merits. The 1961 Agreement provided that at this stage unresolved disputes would be heard by a Joint Western Committee. It is referred to in this opinion as the 1961 Joint Western Committee. On November 12, 1963, the 1961 Joint Western Committee postponed hearing the cases until the unfair labor practice charges before the NLRB regarding Freight Lines and the Southern Locals could be resolved.

Shortly thereafter, Braswell, through CTA and other employers and employer groups, entered into the "1964 National Master Agreement" for the period July 1, 1964

to March 31, 1967. The grievance machinery under this agreement called for a similar grievance committee structure to include a number of Joint State Committees; we refer to the pertinent committee as the 1964 Joint State Committee, a single Joint Western *Area* Committee, which we refer to as the 1964 Joint Western Area Committee, and Multi-Conference Committee, which we refer to as the 1964 Multi-Conference Committee.

The 1964 Agreement did not specifically provide that its machinery would be used to resolve disputes arising under the 1961 Agreements. However, the 1964 Joint State Committee retained the membership and functions of the 1961 Joint Area Committee, and the 1964 Joint Western Area Committee retained the membership and functions of the 1961 Joint Western Committee, substantially unchanged.

The 1964 Joint Western Area Committee retained the dispute after the 1964 Agreement went into force. On July 30, 1965 the National Labor Relations Board decided the unfair labor practice case of the Southern Locals, finding that Braswell had committed unfair labor practices. (See 154 N.L.R.B. 101 (1965).) The 1964 Joint Western Area Committee then proceeded to consider the dispute, but it deadlocked on the actual disposition of the case. The 1964 Multi-Conference Committee, a creature only of the 1964 Agreement, then considered the case because of the deadlock below. It decided that the 1964 Joint Western Area Committee had jurisdiction to determine the dispute and directed it to determine the grievances on the merits. The 1964 Joint Western Area Committee proceeded to do so, sustaining the grievance on the merits and ordering that

strikers who thereafter made an unconditional offer to return to work should be offered reinstatement with full seniority from their last original date of hire. The Committee did not award back pay.

The district court's confirmation of their decision is challenged here on three grounds. Braswell claims (1) that the grievance committees set up under the 1964 Agreements had no jurisdiction to hear grievances arising under the 1961 Agreements, (2) that the committee's decision is not enforceable as an arbitration award because it is not a final, definitive settlement of the dispute, and (3) that the dispute raised by the unions were not grievable under the 1961 Agreement.

1. *Did the 1964 Agreement's grievance committees have jurisdiction?*

The right to arbitrate disputes or to process grievances is wholly dependent upon the terms of the collective bargaining contract. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 574, 582; *Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co.*, 2 Cir., 1962, 312 F.2d 181, 184. And, "the question of arbitrability is for the courts to decide." *United Steelworkers v. Warrior & Gulf Navigation Co., supra*, 363 U.S. at 583 n. 7. Here, the grievances arose under the 1961 Agreements but were decided by a Committee created by the 1964 Agreements. Braswell's claim that the Committee lacked jurisdiction rests upon the absence of specific language in the 1964 Agreements granting the new committees jurisdiction over unresolved disputes arising out of the earlier agreement. The unions assert that the jurisdictional issue is "procedural" and accordingly should be resolved by the arbitrator and also that the parties' intent during

bargaining for the 1964 Agreements was that pending grievances would be processed under the new agreement's procedures.

The argument that the jurisdictional issue was "procedural" and thus left to the grievance committee to decide rests on an interpretation of *John Wiley and Sons, Inc. v. Livingston*, 1964, 376 U.S. 543. *John Wiley* warned against arbitrarily classifying "intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts" (376 U.S. at 557), and further indicated that:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." (*Id.*)

Both parties agree that the relevant agreement to be applied to the merits of this dispute is the 1961 Agreement. The question is only whether the parties were to use the 1964 system of joint grievance committees to complete procedures begun before the 1961 Committees.

Questioning the propriety of a given forum raises issues which would probably not ordinarily be considered procedural. Here, for example, the focus of the grievance machinery shifted from a regional basis in the 1961 Agreement to the national emphasis in the 1964 Agreement. The 1964 Multi-Conference Committee was added as a new and additional step in the review heirarchy, and it had as members people who were further removed from the influence of the parties. In addition, the new grievance procedure was broken down

by trades where the earlier procedure applied to all employees in the eleven western states.

Nonetheless, resolution of the grievance had been stayed by the 1961 Joint Western Committee, and the 1964 Joint Western Area Committee which again took up the matter was substantially the same institution. The three employer members and two of the three union members were the same. These were the people who "replaced [the grievances] on the agenda," *i.e.*, took jurisdiction after the 1964 Agreement went into effect, deadlocked, and thus passed the matter up to the new 1964 Multi-Conference Committee for resolution. The nearly identical composition of the committees, and their substantially identical functions, when coupled with the fact that the changes which were made arose out of a continuing bargaining relationship, suggest that the courts should defer to the committees' decision on jurisdiction rather than choose to decide the question *de novo*.

The 1964 Committees were also in a good position to consider the arguments regarding the intent of the parties in negotiating the 1964 Agreements. These arguments are presented to us as independent grounds for finding that the 1964 Committees had jurisdiction over the carry-over dispute. This court has held that evidence relevant on the question of arbitrability includes evidence of the parties' intent as expressed during collective bargaining. See *Communication Workers v. Pacific Northwestern Bell Telephone Co.*, 9 Cir., 1964, 337 F.2d 455, 458-59; *cf., Association of Industrial Scientists v. Shell Development Co.*, 9 Cir., 1965, 348 F.2d 385, 388 n. 3. The only evidence in the record is that the parties did intend that the 1964 Committees were to have jurisdiction over carryover disputes.

In sum, on these facts we conclude that the 1964 Committees were the proper forums to consider unresolved disputes arising from the earlier agreements. The question of jurisdiction was one for those committees to decide.

2. *Was the grievance committee's decision a final settlement?*

General Drivers Union No. 89 v. Riss & Company, Inc., 1963, 372 U.S. 517, dealt with grievance machinery comparable to that at issue here, and held that "if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under § 301." (372 U.S. at 519.) The Court seemed to equate "definitive settlement" to a "final and binding [grievance award] under the collective bargaining agreement." (372 U.S. at 520.) The *Riss* case was remanded for trial on issues which included the finality point. Here, as in *Riss*, the fact that the dispute settlement steps are not denominated as arbitration proceedings is not of particular consequence and certainly does not prevent our giving effect to them just as we would to proceedings labelled "arbitration."

In both the 1961 and 1964 Agreements the grievance machinery provided contemplates the possibility of a deadlock on the merits at the highest available grievance-appellate level. When such a deadlock occurs the parties are relieved of their no-strike pledge and must thereafter resolve their difference by such self-help action as each deems will be most effective. Here, however, there was a decision, not a deadlock at the highest level. Further, both agreements provide that the union can strike, etc., to enforce an award reached by a griev-

ance committee which was able to resolve a dispute. Article 9, Section 1(i) of the 1961 Agreement also provided:

> "In the event of strikes, work stoppages, or other activities which are permitted in case of deadlock, default or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement."

Article 43, Section 1(g) of the 1964 Western States Area Supplemental Agreements and Article 8(d) of the 1964 National Master Freight Agreement are identical.

Braswell relies upon the fact that neither party can "go to grievance" with foreknowledge that, win or lose, the resulting decision will be enforceable only by judicial action. It also contends that sanctioning a lawful strike or threat of such strike as the remedy to enforce settlement cannot possibly qualify as a "final adjustment" promoting industrial peace within the spirit and meaning of the Supreme Court's *Steelworkers trilogy*.[3]

As an intitial matter we note that the 1964 Agreements provide that a committee decision is specifically stated to be "final and binding," while no such statement is made in the 1961 Agreements. Such a statement of a legal conclusion is not determinative: rather, each agreement will be tested according to its effect.

The Fifth Circuit dealt with comparable questions in *Teamster Local Unions v. Braswell Motor Freight Lines*,

Inc., 5 Cir., 1968, 392 F.2d 1, *modified on petition for rehearing*, 395 F.2d 655. As to the deadlock possibility, in its *Braswell* case that circuit decided that: "Arbitration decisions reached (as opposed to deadlock situations) are final and binding." (392 F.2d at 8 n. 9a.) With that statement we agree even though we cannot determine whether the Fifth Circuit retreated from this position in its later modifying opinion on petition for rehearing.

The possibility of the union's striking to enforce a grievance committee decision is more troublesome. Much of the deference given by courts to arbitration decisions is derived from the Labor-Management Relations Act's policy of promoting industrial peace through giving full play to "the means chosen by the parties for settlement of their differences under a collective bargaining agreement. . . ." *United States Steelworkers v. American Manufacturing Co.*, 1960, 363 U.S. 564, 566 (discussing 29 U.S.C. § 173(d). This policy is hardly served by sanctioning or otherwise encouraging strikes as an alternative means of enforcing grievance awards. But, as counsel for plaintiff unions stated, "an answer is we are in court, we are not in the street." By seeking court enforcement of the award, we think that the plaintiff unions have elected to forego their economic enforcement weapons. Accordingly, they should not be denied court confirmation of an otherwise final award. A case in which a union pursues both judicial and economic remedies will present a question for another court on another day. Compare *Teamsters Local Unions v. Braswell Motor Freight Lines, Inc.*, *supra*, 392 F.2d at 8 n. 9a.

We hold that the Committee's decision was final.

3. Were the union's grievances arbitrable?

The grievances filed by the unions on behalf of the discharged strikers were primarily based upon Article 10, section B-1 of the 1961 Western Master Agreement which provided:

> "It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a lawful primary labor dispute, or refuses to go through or work behind any lawful primary picket line, including the lawful primary picket line of Unions party to this Agreement, and including lawful primary picket lines at the Employer's places of business"

Since the Agreement relates to the rights of employees to refuse to "enter upon any property involved in a lawful primary labor dispute" or to cross "any lawful primary picket line," the grievances do raise the issue of lawfulness of the dispute or of the picketing, or both. Braswell contends that this necessarily requires an inquiry into whether the striker's activities were protected by section 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157, and thus that the issue is one for the National Labor Relations Board to decide. The unions insist that the grievance pertains only to rights guaranteed by the contract and requires only an interpretation of the contract.

We assume that in deciding whether the strikers' activities were lawful, the grievance committee necessarily decided a question which could have been taken to the Board in an unfair labor practice proceeding. Even so, *Vaca v. Sipes*, 1967, 386 U.S. 171, 183-84, 186-87; *Cary v. Westinghouse Corp.*, 1964, 375 U.S. 261, 268; and *Smith v. Evening News Association*, 1962, 371

U.S. 195, 197, all indicate that arbitration or a suit in the federal or state courts is proper even though an alternative remedy before the Board is available.

Braswell seeks to avoid the thrust of these cases by contending that they do not stand for the proposition that a grievance committee is empowered to interpret the Labor-Management Relations Act. But even if such an interpretation was required to resolve this grievance, a necessary concomitant of jurisdiction over the dispute is the power to decide all questions raised, even if the National Labor Relations Board should eventually disagree. *Cf. Carey v. Westinghouse Corp.*, *supra*, 375 U.S. at 272; *Clanebach Inc. v. Las Vegas Local Joint Executive Board of Culinary Workers*, 9 Cir., 1968 388 F.2d 766, 768.

We hold that the grievances were arbitrable.

Affirmed.

FOOTNOTES

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1. For the ultimate disposition of these proceedings, see *Teamsters Local Unions v. NLRB*, D.C. Cir., 1966, 370 F.2d 226.

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2. When the union first brought these grievances Braswell filed an action in the United States District Court seeking a declaration with respect to its duties to submit the grievances to the grievance machinery set up under the 1961 Agreement. The District Court held that Braswell was under a duty to submit the grievances under the 1961 Agreement. An appeal from the judgment of the District Court in this declaratory relief action is now pending in this court, as *Braswell Motor Freight Lines, Inc. v. International Brotherhood of Teamsters*, No. 20,146.

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3. *United Steelworkers v. American Mfg. Co.*, 1960, 363 U.S. 564; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 574; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 1960, 363 U.S. 593.

APPENDIX B.

Findings of Fact and Conclusions of Law.

United States District Court, for the Central District of California.

Local Freight Drivers, Local No. 208; Line Drivers, Local No. 224; and Freight Handlers, Clerks and Helpers, Local No. 357, each affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiffs, v. Braswell Motor Freight Lines, Inc., Defendant. Civil No. 66-339-S.

Filed June 13, 1968.

This cause came on regularly for trial on July 24, 1967, before the Court sitting without a jury, and upon a statement of Agreed Facts. Brundage & Hackler by Charles K. Hackler and Julius Reich appeared as counsel for the plaintiffs, and Russell and Schureman by Theodore W. Russell appeared as counsel for the defendant. The Court having examined the Statement of Agreed Facts, the briefs of the parties, and having heard oral argument, and the cause having been submitted for decision, and the Court being fully advised in the premises makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

It is true that:

1. Plaintiffs Local Freight Drivers, Local No. 208, Line Drivers, Local No. 224, and Freight Handlers, Clerks and Helpers, Local No. 357, hereafter referred to collectively as "the Unions", at all times here pertinent have been, and now are, labor organizations, each

of which is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called "the International".

2. The Unions at all times herein mentioned have been, and now are unincorporated associations in which employees participate and which exist for the purpose, among others, of dealing with employers concerning grievances and terms and conditions of employment in the transportation industry.

3. At all times herein mentioned, defendant Braswell Motor Freight Lines, Inc., herein called "the Employer", has been, and now is a corporation organized and existing under the laws of the State of Texas with its principal offices in that state and an office within this judicial district; and the Employer has been and is now a common carrier of property by motor vehicle in interstate commerce over routes and between points in the states of Texas, New Mexico, Arizona and California.

5. Between July 1957 and July 1, 1964, defendant controlled, through ownership of all of its stock, a Delaware corporation originally known as the D. C. Hall Company and later Braswell Freight Lines, Inc., herein called "Freight Lines". During all of said period Freight Lines was a common carrier of property by motor vehicle over routes and between points extending from Fort Worth and Dallas, Texas to Oklahoma City and Tulsa, Oklahoma, Memphis, Tennessee, Jackson, Mississippi and New Orleans, Louisiana. The only points served in common by the Employer and Freight Lines were Fort Worth and Dallas, Texas.

6. The Employer's operations between Dallas and Houston, Texas and Los Angeles, California at all

times herein mentioned have been, and now are, divided into two divisions, one commonly known and herein referred to as the "Western Division" covering the Employer's operations west of El Paso, Texas, and another commonly known and herein referred to as the "Eastern Division", covering its operations from El Paso, Texas and points east thereof to and including Dallas and Houston, Texas. On July 1, 1964, Freight Lines was merged into the Employer and since that date the Employer has conducted the former operations of Freight Lines as a separate division.

7. The Employer's Eastern and Western Divisions have for some years constituted separate units for collective bargaining purposes and have been so recognized by the National Labor Relations Board, herein called "the NLRB".

8. At all times herein mentioned, the Employer has been, and now is, a member of a nonprofit California corporation known as California Trucking Associations, Inc., herein called "the CTA", which is an association representing employers for purposes of collective bargaining.

9. On September 15, 1961 the CTA entered into an agreement with the Unions and various other labor unions for and on behalf of the Employer (and other employers) which said agreement was entitled "Western States Area Master Freight Agreement", herein called "the 1961 Western Master Agreement", along with various supplements thereto, and the term of the 1961 Western Master Agreement and its supplements was from July 1, 1961 through June 30, 1964.

10. The 1961 Western Master Agreement and the various supplements covered the Employer's Western Division employees.

11. In 1958 an employer association known as the Southwest Operators Association, acting as a multi-employer bargaining agent for Freight Lines and other employers, negotiated a contract with certain unions affiliated with the International, including Local Unions 5, 47, 270, 523, 667, 745, 886 and 891, hereafter referred to collectively as "the Southern Locals". Said agreement expired by its terms on January 31, 1961. The Employer was never a party to said agreement.

12. Prior to January 31, 1961, Freight Lines withdrew from the Southwest Operators Association. Since January 31, 1961, Freight Lines and the Southern Locals have engaged in negotiations in an attempt to reach a collective bargaining agreement covering the employees of Freight Lines, but no agreement has been reached.

13. The Southern Locals went on strike against Freight Lines on April 23, 1962.

14. On April 28, 1962, the Southern Locals filed with the NLRB a charge that Freight Lines, the Employer, and J. V. Braswell (the owner of substantially all of the Employer's stock) had engaged in unfair labor practices in violation of sections 8(a)(1) and (5) of the National Labor Relations Act, herein called "the Act".

15. On June 11, 1962, the Unions and the Western Master Freight Division of the Western Conference of Teamsters called a strike against the Employer and established picket lines at the Employer's freight terminal at Los Angeles, California and other terminals, stating that it was for the sole purpose of protesting unfair labor practices of Freight Lines, the Employer and J. V. Braswell against the Southern Locals. The strike and picketing were continued by the Unions un-

interrupted from June 11, 1962 to April 1, 1963. (This period is herein referred to as "the Strike Period".)

16. On June 11, 1962 when the strike against the Employer by the Unions was called, most of the persons then employed by the Employer who were subject to the 1961 Western Master Agreement joined the strike and ceased performing work for the Employer.

17. The Employer continued to conduct business operations during the Strike Period, and employed other persons to perform the work which the persons who joined the strike called by the Unions had performed prior thereto.

18. The strike against the Employer and picketing at terminals on its Western Division were discontinued on April 1, 1963, at which time the Unions notified the Employer that the strike was being terminated and that all of the persons who had gone on strike and who were represented by the Unions were unconditionally offering to return to work for the Employer.

19. Since April 1, 1963 the Employer has continued to employ persons who entered its employment during the Strike Period, to perform work which was performed before the Strike Period by persons who joined the strike.

20. On various occasions after April 1, 1963, and prior to April 30, 1963, the Unions and individuals who had joined the strike demanded that the Employer allow the persons who had joined the strike to return to work for the Employer in the position to which such persons would have been entitled had they continued to work during the Strike Period.

21. With respect to these demands, the Employer's stated position was that each of such persons who had

joined the strike had been permanently and legally replaced and had ceased to be employees of the Employer, but that the Employer would accept them for employment as new employees as positions might become available.

22. Pursuant to article 8 of the 1961 Western Master Agreement, there was established by the parties to that agreement a number of committees, each consisting of equal numbers of union and management representatives for various geographical areas covered by the 1961 Western Master Agreement. Among the areas for which such a committee was established was the Southern California area, and this committee was called the Southern California Joint Area Committee. In addition, there was similarly established a single committee called the Joint Western Committee.

23. On April 30, 1963, the Unions each filed with the Southern California Joint Area Committee a grievance (a) asserting that after the strike was discontinued the Employer had failed and refused to assign work to persons who had joined the strike, in accordance with the seniority rights to which such persons were entitled and that such action on the part of the employer constituted a violation of the provisions of Article 6, Section 1 (seniority), and Article 10, Section B-1 (protection of rights) of the 1961 Western Master Agreement, and, (b) requesting that proceedings be had with respect to such grievances under the provisions of Articles 8 and 9 of the 1961 Western Master Agreement.

24. The Unions' grievances were assigned for hearing before the Southern California Joint Area Committee on June 3, 1963.

25. On May 29, 1963 the Employer filed an action against the Unions and others in the United States District Court for the Southern District of California, Central Division, entitled "Braswell Motor Freight Lines, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., Civil Action No. 63-634-EC", herein called "the Declaratory Relief" action. In that action the Employer sought a declaration that the disputes claimed as the basis of the grievances filed by the Unions were not subject to determination under the grievance procedures provided for in the 1961 Western Master Agreement.

26. On June 3, 1963 the Southern California Joint Area Committee held a meeting at which representatives of the Unions appeared, and at which the Employer entered a special appearance for the purpose of challenging the jurisdiction of the Southern California Joint Area Committee and its legal right to hear and determine the issues raised by the grievances of the Unions.

27. On June 6, 1963, the Southern California Joint Area Committee voted to overrule the objections of the Employer to the jurisdiction of the Committee, on the ground that "the grievances involve matters which the parties have agreed shall be submitted to grievance procedures", and the Committee voted to hear the cases. Thereupon the Employer again made a special appearance and presented a statement in which it objected to the jurisdiction and legal right of the Southern California Joint Area Committee to hear and decide the grievances. Representatives of the Unions also appeared and made statements with respect to their positions as to the jurisdiction of the Committee, its legal right to hear the

cases and as to the merits of the grievances. The Southern California Joint Area Committee then deadlocked on the merits of the grievances.

28. On July 18, 1963, on behalf of the Unions, a petition was filed requesting a review by the Joint Western Committee.

29. The grievances were thereafter considered at a meeting of the Joint Western Committee held August 14, 1963, and the Joint Western Committee voted with respect to said matters, as follows:

"In view of the statement made by the [Employer], that the NLRB had reopened the case [involving the unfair labor practice charges filed by the Southern Locals] and that a determination has not yet been made, . . . this Committee postpone the cases . . . and retain jurisdiction."

30. At a subsequent meeting of the Joint Western Committee held on November 12, 1963, the Unions' cases were further considered by the Joint Western Committee and said Committee voted in executive session with respect to said complaints as follows:

"[The cases are] postponed and taken off of the agenda until such time as the National Labor Relations Board disposes of them and then they [should] be refiled."

31. On January 10, 1964 the CTA, acting on behalf of the Employer (and other employers), entered into an agreement with the National Over-The-Road and City Cartage Policy and Negotiating Committee and the Unions (among others, including the Southern Locals), entitled "National Master Freight Agreement Covering Over-The-Road and Local Cartage Employees

of Private, Common, Contract and Local Cartage Carriers," and various supplements thereto, herein called "the 1964 National Master Agreement," for the period of July 1, 1964 to March 31, 1967.

32. The Declaratory Relief Action filed by the Employer proceeded to trial; the Court rendered a written opinion on November 17, 1964; and on March 25, 1965 it entered Findings of Fact and Conclusions of Law and a Judgment. The Employer appealed from said Judgment to the Court of Appeals for the Ninth Circuit, and the appeal is pending and undetermined.

33. The various supplemental agreements to the 1964 National Master Freight Agreement provide for the creation of a number of committees, each consisting of equal numbers of Union and management representatives for various geographical areas covered by the agreements. Among the committees so created are a number of Joint State Committees and a single Joint Western Area Committee.

The 1964 National Master Agreement established a multi-conference committee which was empowered to decide, based solely on the provisions of said National Master Agreement or an applicable supplemental agreement, (i) factual grievances arising under the 1964 National Master Agreement, or supplements thereto; or (ii) questions of interpretation arising under the provisions of a supplemental agreement, as to which there had theretofore been a deadlock upon the completion of grievance procedure provided for under the supplemental agreements, as a result of which a work stoppage involving more than one area was threatened.

34. On July 30, 1965, the NLRB, in a decision reported at 154 N.L.R.B. 101 (1965), found with re-

spect to the charges that had been filed by the Southern Locals that:

> "(a) By resolving not to reach a collective-bargaining agreement with the [Southern Locals], not to sign one, and engaging in bad-faith collective-bargaining negotiations in keeping with this resolve, [Freight Lines, the Employer, and J. V. Braswell] have on October 20, 1961, and thereafter engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
>
> "(b) The strike by the employees of . . . Freight Lines commencing on April 23, 1962, was caused and prolonged by [Freight Lines], the Employer's, and J. V. Braswell's] unfair labor practices.
>
> "(c) [Freight Lines, the Employer, and J. V. Braswell] did not engage in any of the other unfair labor practices alleged in the amended complaint."

The NLRB's order was subsequently enforced by order of the Court of Appeals for the District of Columbia on October 12, 1966 [reported at 370 F. 2d 226 (D.C. Cir., 1966)], and that court's order is now final.

35. On September 16, 1965, the Joint Western Area Committee met and deadlocked on (a) a motion to submit the Unions' grievances to arbitration, and (b) a motion that it was inappropriate at that time to hear the Unions' grievances in light of the fact that the National Labor Relations Board cases were then on appeal in the federal courts and in view of other litigation then pending relating to the Unions' grievances.

36. On October 12, 1965, a Multi-Conference Committee created as provided in Article 8 of the 1964

National Master Agreement met and considered the matters upon which there had been a deadlock on September 16, 1965 by the Joint Western Area Committee.

37. On November 11 and 12, 1965, the Joint Western Area Committee met and heard the grievances of the Unions, and on November 12, 1965 made the following decision:

> "[T]he grievance is sustained: Under the circumstances, the ruling of this Committee is that those Braswell employees who observed picket lines on the basis of Braswell's unfair labor practices and who thereafter made unconditional offer to return to work, shall now be offered reinstatement with full seniority from their last original date of hire."

38. On various occasions since November 12, 1965 representatives of the Unions and individuals who had joined the strike have demanded that the Employer allow the persons who had joined the strike to return to work for the Employer in the positions to which they would have been entitled had they continued to work during the Strike Period, and on each occasion the Employer refused.

39. At various stages of the grievance procedure, the Employer raised each of the legal and factual contentions that have been raised in this proceeding in opposition to the Unions' suit to confirm the award of the Joint Western Area Committee, and on each such occasion the committee before which such contentions were raised unanimously ruled adversely to the Employer with respect to such contentions.

The following Conclusions of Law, insofar as they may be found to be Findings of Fact, are in all respects true.

From the foregoing facts, the Court makes the following

CONCLUSIONS OF LAW

1. The Unions, and each of them, are labor organizations representing employees in an industry affecting commerce within the meaning of the Labor Management Relations Act, herein called "the Act."

2. The Employer is an employer in an industry affecting commerce within the meaning of the Act.

3. The Court has jurisdiction of this suit to confirm the decision of the Joint Western Area Committee, dated November 12, 1965, and this is a case arising under section 301(a) of the Act [29 U.S.C. § 185(a)].

4. (a) Prior to July 1, 1964, the grievance procedure established in Articles 8 and 9 of the 1961 Western Master Agreement was the chosen instrument of the parties for the definitive and final settlement of all the disputes between the Employer and the Unions raised by the complaints of the Unions filed on April 30, 1963.

(b) From and after July 1, 1964, the grievance procedure established in Articles 7 and 8 of the 1964 National Master Agreement, and in Article 42 and Article 43 of the applicable supplements thereto, was the chosen instrument of the parties for the definitive and final settlement of all the disputes between the Employer and the Unions raised by the complaints of the Unions filed on April 30, 1963.

5. At all times between July 1, 1964 and March 31, 1967, both inclusive, the Unions and the Employer were parties to a collective-bargaining agreement designated as the National Master Freight Agreement covering Over-The-Road and Local Cartage Employees of Private, Common, Contract and Local Cartage Carriers [herein called "The 1964 National Master Agreement"] and various supplements thereto, covering employees of the Employer engaged in operations of the Employer west of El Paso, Texas, who were members of the Unions.

All of the disputes between the Employer, on the one hand, and the Unions and their members, on the other hand, raised by the complaints filed by the Unions against the Employer on April 30, 1963 are disputes which the parties agreed in the 1961 Master Freight Agreement to submit to determination through the grievance procedures provided for in Articles 8 and 9 of said 1961 Master Freight Agreement.

Prior to July 1, 1964, resort to the grievance procedure provided for in Articles 8 and 9 of the 1961 Master Freight Agreement was mandatory for determination of the disputes raised by the complaints of the Unions against the Employer filed April 30, 1963.

From and after July 1, 1964, the grievance procedure provided for in Articles 8 and 9 of the 1961 Master Freight Agreement ceased to be applicable for determination of the disputes raised by the complaints filed by the Unions against the Employer on April 30, 1963.

During the course of negotiating the 1964 National Master Agreement [including applicable supplements thereto], the Employer and Unions agreed that all dis-

putes raised by the complaints of the Unions against the Employer filed on April 30, 1963 remaining unresolved on July 1, 1964, were thereafter determinable through the grievance procedures established in Articles 7 and 8 of the 1961 National Master Agreement and in Articles 42 and 43 of the applicable supplements thereto.

The phrase in Article 9, section 1(h) of the 1961 Western Master Agreement, "refusal of either party to submit to or appear at the grievance procedure at any stage . . . withdraws the benefits of Article 9 [containing the grievance machinery]," has reference to conduct that must be followed once the grievance machinery has been set in motion, and the benefits of the grievance machinery were not withdrawn from the Unions by virtue of the fact that they took strike action June 11, 1962 without first filing a grievance to protest the Employer's unfair labor practices. *Braswell Motor Freight Lines, Inc. vs. International Brotherhood of Teamsters*, 58 L.R.R.M. 2331, 2333 (S.D. Cal., 1964).

6. The Unions' grievances were arbitrable.

7. The Joint Western Area Committee had jurisdiction to hear the Unions' grievances.

8. The "special appearance" made by the Employer before each of the committees does not relieve it of the obligations of the decisions of any of the committees before whom such an appearance was made, including the Joint Western Area Committee. *Amalgamated Meat Cutters vs. Penobscot Poultry Co.*, 200 F. Supp. 879, 882-83 (D. Me., 1961); *Ulene vs. La Vida Sportswear Co.*, 220 Cal. App. 2d 335, 338 (1963) (applying federal law); *International Bhd. of Teamsters vs. Trudon & Platt Motor Lines, Inc.*, 147 A. 2d 484,

31 Lab. Arb. 685 (Comm. Sup. Ct. of Err., 1958); *International Bhd. of Teamsters vs. Shapiro*, 82 A. 2d 345, 16 Lab. Arb. 671 (Comm. Sup. Ct. of Err., 1951).

9. The decision of the Joint Western Area Committee, dated November 12, should be confirmed and enforced, *United Steelworkers vs. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and judgment entered in favor of the Unions and against the Employer.

DATED: June 13, 1968.

Albert Lee Stephens, Jr.
Albert Lee Stephens, Jr.
United States District Judge

APPENDIX C.

LABOR MANAGEMENT RELATIONS ACT §203(d)

(61 Stat. 153; 29 USC §173(d))

§203(d)

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * * * * *

LABOR MANAGEMENT RELATIONS ACT §301(a)

(61 Stat. 156; 29 USC §185(a))

§301(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

APPENDIX D.

Text of Article 8 and Article 9 Section 1 of Western States Area Master Freight Agreement Effective July 1, 1961 Through June 30, 1964.

ARTICLE 8. GRIEVANCE MACHINERY COMMITTEES

Section 1. Joint Area Committees

The Employers and the Union shall establish permanent joint area labor management committees as follows: one (1) for the State of Washington and Northern Idaho; one (1) for the State of Oregon; three (3) for the States of California and Nevada; one (1) for the States of Colorado and Wyoming; one (1) for the States of Utah and Southern Idaho; one (1) for the States of Arizona and New Mexico, and El Paso, Texas, and one (1) for the State of Montana. Each such committee shall be referred to hereinafter as "Joint Area Committee." The Union and Employer committees shall consist of three (3) members and three (3) alternates. Each member may appoint an alternate in his place.

The Joint Area Committee shall at its first meeting formulate rules of procedure to govern the conduct of its proceedings. Each Joint Area Committee shall have jurisdiction over disputes and grievances involving Local Unions, or the complaints by Local Unions, arising under this Agreement or agreements supplemental hereto in the respective areas of each of the Joint Councils as set forth in the first (1st) paragraph of this Section.

Section 2. Joint Western Committee

The Employers and the Unions shall together create a permanent Joint Western Committee which shall consist of delegates from each of the areas named in Section 1 of this Article, and this Committee shall meet at established times and at a mutually convenient location.

The Joint Western Committee shall formulate rules of procedure to govern the conduct of its proceedings as it may deem advisable.

Section 3. Function of Committees

It shall be the function of the various committees above referred to to settle disputes which cannot be settled between the Employer and the Local Union in accordance with the procedures established in Article 9, Section 1.

Section 4. Change of Terminals and or Operations

Present terminals, breaking points, or domiciles shall not be transferred or changed nor shall there be any transfers of equipment between terminals which will adversely affect the employment opportunities of the employees at the terminal from which such transfer of equipment is to be made without the Employer first having asked for and received approval from the subcommittee on Change of Operations, the members of which shall be appointed by the Joint Western Committee at each regular meeting. This shall not apply within the established city cartage radius of the individual Local Union.

Section 5. Attendance

Meetings of the Joint Western and the Joint Area Committees shall be attended by each member of such committee or an alternate.

Section 6. Examination of Records

The Local Union, Joint Area Committee, or the Joint Western Committee shall have the right to examine time sheets and any other records pertaining to the computation of compensation of any individual or individuals whose pay is in dispute.

ARTICLE 9. GRIEVANCE MACHINERY AND UNION LIABILITY

Section 1. Procedures

The Union and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise. Disputes shall be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

(a) Where a Joint Area Committee by a majority vote settles a dispute, no appeal may be taken to the Joint Western Committee. Such a decision will be final and binding on both parties. Provided, however, that the Joint Western Committee shall have the right to review and reverse any decision of the area Committee and make a final decision on the case if the Joint Western Committee has reason to believe the decision was not based on the facts as presented to the Area Committee or in the possession of either party and not

presented to the Area Committee; provided further, however, that such action by the Joint Western Committee may be taken only by unanimous vote.

Action by the Joint Western Committee to review a decision made by a Joint Area Committee must be taken no later than the second regular meeting of the Joint Western Committee following the rendering of the decision by the Joint Area Committee, or the right to such review and any possible reversal is waived.

(b) Where a Joint Area Committee is unable to agree or come to a decision on a case, it shall, at the request of the Union or the Employer involved, be appealed to the Joint Western Committee at the next regularly constituted session.

(c) Minutes of the Area Committee shall set forth the position and facts relied on by each party, but each party may supplement such minutes at the hearing before the Joint Western Committee.

(d) It is agreed that all matters pertaining to the interpretation of any provisions of this Agreement may be referred by the Area Secretary for the Union or the Area Secretary for the Employers at the request of either the Employers or the Unions, parties to the issue, with notice to the other Secretary, to the Joint Western Committee at any time for final decision. At the request of the Company or Union representative, the Joint Western Committee shall be convened on seventy-two (72) hours notice to handle matters so referred.

(e) All cases deadlocked in the Joint Western Committee with the exception of those provided in sub-section (f) of this Article may be submitted to umpire

handling if a majority of the Joint Western Committee determines to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse.

(f) Any cases deadlocked in the Joint Western Committee which pertain to sub-contracting, closing of terminals, discontinuance of runs, discharge and suspension shall be submitted to umpire handling.

(g) The Impartial Umpire referred to in sub-sections (e) and (f) shall be selected on a case to case basis by the Joint Western Committee from a list of arbitrators submitted by the San Francisco Regional Office of the Federal Mediation and Conciliation Service. Such Umpire shall be selected immediately by the Joint Western Committee upon deadlocking the case, and a hearing on the deadlocked case shall be commenced in San Francisco within three (3) days from the deadlock by the Joint Western Committee. Decisions of the Umpire shall be issued not later than ten (10) days from the close of the hearing unless the parties involved mutually agree to the contrary. The decision of the Umpire shall be specifically limited to the matter submitted to him and he shall have no authority in any manner to amend, alter or change any provision of this Agreement. The compensation of the Umpire shall be determined by the Joint Western Committee and all expenses incurred shall be borne jointly.

(h) Failure of any Joint Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any stage, or failure to comply with any final decision, withdraws the benefits of Article 9.

(i) In the event of strikes, work stoppages, or other activities which are permitted in case of dead lock, default or failure to comply with majority decisions; no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.